

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	Nos. 2:14-cr-110
	:	2:14-cr-111
v.	:	2:14-cr-112
	:	2:14-cr-114
	:	2:14-cr-115
	:	
STEPHEN HERNDON,	:	Date: December 8, 2014
SCOTT ELLIS,	:	
ALVIS PORTER &	:	
DAVID HERNDON,	:	
	:	
Defendants.	:	

x

TRANSCRIPT OF MOTIONS HEARING HELD
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government: AUSA MEREDITH GEORGE THOMAS
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Court Reporter: Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E. Johnston,
2 Judge, United States District Court, Southern District of West
3 Virginia, in Charleston, West Virginia, on December 8, 2014, at
4 10:08 a.m., as follows:

5 COURTROOM DEPUTY CLERK: The matter before the Court is
6 the United States of America versus Stephen Herndon, criminal
7 action number 2:14-cr-110; United States v. Scott Ellis, criminal
8 action number 2:14-cr-111, United States v. Alvis Porter,
9 criminal action number 2:14-cr-112; United States v. Ronald
10 Barnette, 2:14-cr-114; and United States v. David Herndon,
11 2:14-cr-115, scheduled for a motions hearing.

12 THE COURT: As much as I hesitate to say this, good
13 morning. Will counsel note their appearances?

14 MS. THOMAS: Meredith George Thomas on behalf of the
15 United States.

16 MR. HISSAM: Mike Hissam on behalf of Ronald Barnette,
17 who is present in the courtroom; Defendant Scott Ellis, who is
18 present in the courtroom, and sitting to my immediate left.

19 MR. DIPIERO: Tim DePiero on behalf of Mr. Alvis
20 Porter, who is also present, Your Honor.

21 MR. CARR: John Carr on behalf David Herndon and
22 Stephen Herndon, who are present in the courtroom

23 THE COURT: Anybody else want to note an appearance? I
24 know I see a lot of other lawyers around the courtroom.

25 All right. I set this matter for a hearing because we've

1 got a little bit of a mess on our hands, and I can't resist
2 starting out by saying, Mr. DiPiero, I told you so, but where it
3 stands, I believe, is that Mr. DiPiero has conceded that he has a
4 conflict and has to get out of these cases; is that correct?

5 MR. DIPIERO: Yes, Your Honor.

6 THE COURT: All right. So let's start then. You have
7 -- Mr. Roeher has already been sentenced.

8 MR. DIEPIERO: Yes, Your Honor.

9 THE COURT: And then you have previously made
10 appearances for Stephen Herndon, Scott Ellis, and Alvis Porter?

11 MR. DIPIERO: Yes, sir.

12 THE COURT: All right. And you are moving to withdraw
13 from all three?

14 MR. DIPIERO: No, just from Mr. Herndon and from Mr.
15 Ellis, not from Mr. Porter.

16 THE COURT: Are you sure about that?

17 MR. DIPIERO: I'm fairly confident about that one, Your
18 Honor, yes.

19 THE COURT: You told me you were fairly confident about
20 something before, Mr. DiPiero.

21 MR. DIPIERO: I agree, but I'm confident I'm okay with
22 Mr. Porter.

23 THE COURT: By the way, both of you -- Mr. Hissam, you
24 said that you entered an appearance for Mr. Ellis and, Mr. Carr,
25 the elder Mr. Herndon. That's not a done deal, okay?

1 MR. HISSAM: I understand, Your Honor.

2 MR. CARR: Yes, Your Honor.

3 THE COURT: All right.

4 MR. DIPIERO: Your Honor, if there is anyone who would
5 object, they would be here today, about my representing Mr.
6 Porter.

7 THE COURT: I might object.

8 MR. DIPIERO: Oh, I'm sorry. I meant --

9 THE COURT: I'm serious. I --

10 MR. DIPIERO: Yes, sir.

11 THE COURT: You know, this is a mess.

12 MR. DIPIERO: Yes, sir.

13 THE COURT: And this is the second time I've allowed
14 this to happen and, in both times, it blew up and, you know, I'm
15 not really inclined to let it go forward. So we're going to have
16 to talk this all out today. So, you know, you're going to move
17 to withdraw from Herndon and Ellis. Apparently, everybody agrees
18 that that's appropriate. You know, we'll wait for the 2255 on
19 Roeher.

20 You can have a seat.

21 So, it seems to me, we've got a question then as to whether
22 or not you can continue to represent Mr. Porter. Now, this all
23 came about originally as a result of Mr. Hissam's motion to
24 relieve you as counsel for Mr. Ellis and to enter an appearance
25 for Mr. Ellis and, Mr. Hissam, I have to confess, I saw that as a

1 little ironic, given that you already represented Mr. Barnette.

2 So, you know, I'm not really in the mood for joint
3 representation in this case, at this point, and the problem is,
4 as I explained in detail to Mr. DiPiero back in the spring, is
5 these guys were all doing business at one place. I know they --
6 they own different companies, some of them had joint ownership,
7 but they were all doing business at the same place.

8 It's not exactly a Metropolitan area. So there's tremendous
9 potential here for there to be conflict that none of us see
10 today. I felt that way about this last spring. It turned out
11 that feeling was justified. So, tell me why I should allow you
12 to make an appearance on behalf of Mr. Ellis.

13 MR. HISSAM: Yes, Your Honor, and I would like to spend
14 some time dealing with this issue. I expected the Court would be
15 concerned about it. That's why, in my motion for substitution of
16 counsel, I made sure to disclose the fact that I represented
17 Defendant Ronald Barnette.

18 The key simplest explanation I can give the Court, and I'll
19 go into greater detail, is that this is a classic hocus pocus
20 conspiracy allegation. The problem, from my perspective, with
21 Mr. DiPiero's representation, joint representation of certain
22 defendants in this case, is that they rested on the same spoke,
23 not on different spokes and, in these cases, in conspiracy cases,
24 that becomes very important.

25 THE COURT: Are you sure you see the whole bicycle?

1 MR. HISSAM: I believe I do, Your Honor, if I can
2 explain.

3 THE COURT: So didn't he six months ago.

4 MR. HISSAM: Your Honor, Mr. DiPiero -- I've reviewed
5 the transcripts closely of the two prior hearings and, for the
6 record, I will note that that was July 9th, at Mr. Roeher's plea
7 hearing, where this was discussed in detail by Mr. DiPiero and,
8 on July 16th, at Mr. Herndon -- Mr. Stephen Herndon's and Mr.
9 Ellis's plea hearing, which was a joint plea hearing, which it
10 was discussed in great detail.

11 As I understand it, and I will let Mr. DiPiero speak for
12 himself, but as I understand it, his firm previously represented
13 Defendant Alvis Porter, and had in another matter for sometime.
14 He then was contacted by Defendant Roeher, who was a close
15 personal friend of his, had been for fifteen years.

16 I understand it and, I believe, as Mr. DiPiero continues to
17 understand today, I think the government, Mr. Porter and Mr.
18 Roeher, in my view, did not have an actual impermissible conflict
19 and I will use the terminology "actual impermissible conflict" to
20 mean in the *Wheat* case, the big seminal case in the United States
21 Supreme Court on conflicts, in the *Wheat* case, the Supreme Court
22 talks about two things, an actual impermissible conflict, which
23 is what I would call would be a real live conflict as we sit here
24 today;

25 And then, second, the serious potential for a conflict and,

1 in the *Wheat* case, the Supreme Court said, "District judges must
2 have discretion, not only in the case of an actual conflict, but
3 in a serious potential for a future conflict to disqualify
4 counsel, and it's a case-by-case determination to be made by the
5 district judge in his or her discretion."

6 In my view, between Mr. Porter and Mr. Roeher, Mr. DiPiero
7 did not have an actual conflict because they were not business
8 partners, they did not rest on the same spoke. I don't believe
9 that he had potential for a conflict, and I don't -- I don't know
10 where that stands today. I'll defer to him.

11 Where things went off the rails, Your Honor, from my
12 perspective, is when Defendant 3 got out. Defendant 3 was
13 Stephen Herndon. Defendant 3 was a business partner with Roeher.
14 At that moment, Lawyer DiPiero had two clients resting on the
15 same spoke, who were in the same business.

16 Now, Your Honor will understand that when two gentlemen are
17 in the same business, they're familiar with each other's
18 dealings. And I mean the same factual dealings. I don't mean
19 the general conduct of the conspiracy. They're familiar with the
20 business's finance. They're often participants in joint
21 conversations. They often have the same bookkeeper. They often
22 were at the same meetings. They often made joint business
23 decisions.

24 That is the issue that arose when Mr. DiPiero attempted to
25 represent Stephen Herndon and Mr. Roeher. He then had three

1 clients and, at that point, my position is the United States was
2 aware because, on Sunday, March the 23rd, Mr. DiPiero represented
3 to the Court at one of these hearings, on Sunday, March 23rd, a
4 12-hour meeting took place at the DiTrapano Law Firm and, at that
5 meeting, had Mr. Roeher present, and Mr. Herndon present, and
6 there was a discussion of Mr. Ellis in that meeting and there was
7 a discussion that Mr. Ellis was going to be approached the next
8 day.

9 And, the Court may recall, at the July 9th hearing, said --
10 asked a question. Your Honor asked Mr. DiPiero, because Mr.
11 DiPiero had said, "They told us not to talk," and Your Honor
12 said, "Who told you not to talk," and Mr. DiPiero said, "Thomas
13 Ryan, the government," told Stephen Herndon and Mr. DiPiero not
14 to tell Mr. Ellis that the government was going to come and see
15 him the next morning.

16 That's where things got very strange, Your Honor, because
17 Mr. Ellis was about to be approached by federal law enforcement.
18 He was about to be interviewed. In fact, he was interviewed the
19 next day, Monday, March 24th, at the IRS Task Force here in
20 Charleston. He was interviewed without a lawyer present and, at
21 the end of that interview, law enforcement made a telephone call
22 to Mr. Ryan and Mr. Ryan then said, "What do we do with Mr.
23 Ellis," and Mr. Ryan purportedly said, "Give him to Tim DiPiero."

24 Law enforcement then escorted Mr. Ellis to Mr. DiPiero's
25 office, whom he had never met and, at that point, Your Honor, he

1 got a fourth client. Now, that conflict was actual, and it was
2 real, and the reason was, because just like Mr. Roeher and Mr.
3 Stephen Herndon, Mr. Ellis was business partners with Mr. Stephen
4 Herndon in the same case, in the same business, and Tri-State
5 Mine Repair. More importantly, Mr. Herndon had previously been
6 inside at Arch, had worked at Arch for two years, at which point
7 in time, Mr. Ellis was a vendor, and Your Honor can imagine the
8 conflicts created by that scenario.

9 And so, you have -- now you have two different sets of
10 business partners in the same business on the same spoke of an
11 alleged conspiracy who are represented by joint counsel. That's
12 the exact fact pattern that was in the *Week* case. That's the
13 exact fact pattern that was in this Court's *Hersman* case back in
14 March of 2013, where you have Client A v. Client B and, Your
15 Honor, it could not be any clearer in this case, in terms of
16 Stephen Herndon and Mr. Ellis, than the government's sentencing
17 memorandum from Mr. Herndon, Stephen Herndon, which is
18 Document 22 in case number 2:14-cr-110, and the United States
19 says on Page 3, "Mr. Stephen Herndon provided information that
20 assisted in the cooperation of Ellis. This information",
21 dropping down, "This information provided leverage to induce
22 guilty pleas from those individuals." Your Honor, to me, that's
23 classic conflict. That's Client A on Client B inducing a guilty
24 plea.

25 Now, you turn to Mr. Barnette and Mr. Ellis. Mr. Barnette

1 and Mr. Ellis have never been business partners in any business.
2 They have never been in a joint business venture of any sort.
3 Mr. Barnette has been at Mining Repair Specialist, MRS, his
4 entire career. He also has a company called LMF, which Mr. Ellis
5 has nothing to do with. They're, quite simply, not remotely, and
6 not alleged to be remotely, on the same spoke of a conspiracy.

7 THE COURT: Well, I don't know about spokes, but the
8 government says in its response to your original motion that,
9 "The Defendant now asserts that he was not engaged in any
10 criminal conduct with Ronald Barnette" -- "defendant", referring
11 to Mr. Ellis, "who is currently represented by Michael Hissam.
12 The United States also disagrees with that assertion."

13 MR. HISSAM: And, as I point out in my reply, Your
14 Honor, we disagree with their disagreement, but because the
15 United States has not decided to tell us what their disagreement
16 is factually, Your Honor, I don't know what the conflict is.

17 And, if you turn to the next page, Your Honor, the top of
18 Page 2, Paragraph 3, "The United States does not oppose
19 Defendant's motion for substitution of counsel, so long as
20 Defendant Ellis and Defendant Barnette enter into any applicable
21 waivers."

22 So, Ms. Thomas said in Paragraph 3 on Page 2, Ms. Thomas has
23 said that this is a waivable conflict, which in the week case,
24 that means this is an actual conflict. This isn't Category I.
25 This isn't an actual impermissible, irreconcilable conflict.

1 It's a conflict that in the United States' mind, is subject to
2 waiver, which I have, and prepared to tender to the Court and
3 allow Mr. Barnette and Mr. Ellis to participate in a full
4 colloquy with the Court.

5 Your Honor, I understand the Court's hesitation given what
6 has happened so far.

7 THE COURT: Hesitation is a generous description.

8 MR. HISSAM: I understand, Your Honor, and my response
9 to that would be that, given what has happened so far, the
10 fundamental breakdown in this case was with the two business
11 partners, the joint representation of two business partners,
12 which Your Honor suggested at both of these hearings, in these
13 transcripts, suggested that while Porter and Roeher may be okay,
14 you saw problems with Roeher/Herndon and Herndon/Ellis, and those
15 are the problems that have developed, and you also pointed out
16 that you saw problems at sentencing, and it will not surprise the
17 Court that this issue came to a boiling point on November 11th,
18 Veteran's Day, November 11th of this year, and that Mr. Stephen
19 Herndon's sentencing hearing was set for the very next day,
20 November 12th.

21 And that's exactly what happened, Your Honor, the sentencing
22 of a co-defendant's business partner, and the issues with
23 sentencing, and the arguments that were going to be made at
24 sentencing, are what brought this to the forefront. Those issues
25 with a co-defendant business partner do not exist between Mr.

1 Barnette and Mr. Ellis.

2 And I know that this is a difficult issue and, Your Honor,
3 I, myself, have been in this issue earlier this year or,
4 actually, it was last year, in 2013, in a criminal case in the
5 Western District, Virginia, and the judge there, Jim Jones, James
6 Jones, confronted this same issue where I represented a defendant
7 who was going to trial. One of my law partners represented a
8 defendant who was a defendant in an information case who was
9 going to testify at trial. The government attempted to
10 disqualify us.

11 We briefed the issue, we had a hearing, the Court conducted
12 colloquies, and the Court, Judge Jones, decided an opinion, it's
13 not published, but it's on Westlaw, decided that we could, under
14 the *Wheat* case, and under Fourth Circuit precedent, continue to
15 represent David Cline, even though my firm continued to represent
16 a witness and who testified -- and actually did testify at that
17 trial because of the different spokes of a conspiracy.

18 THE COURT: I don't know what that's supposed to
19 convince me of here. That's a different case, different judge,
20 different district, different facts.

21 MR. HISSAM: Sure.

22 THE COURT: That's not going to convince me of anything
23 in this case.

24 MR. HISSAM: Sure. And I just mentioned, Your Honor,
25 that it is a case-by-case, fact-by-fact scenario, because it's a

1 difficult issue where the Court is -- the Court is weighing a
2 defendant's constitutional right to retained counsel of his
3 choice against a potential conflict, and there are two competing
4 interests; conflict-free representation, on the one hand, which
5 is in the interest of justice and protected by the Fifth
6 amendment and, on the other hand, a defendant's right to counsel
7 of free choice.

8 And, I would argue, Your Honor, that because constitutional
9 issues are involved, any remedy must be narrowly tailored. It
10 must not be --

11 THE COURT: Well, the simplest thing is for everybody
12 to have their own lawyer. Then you don't have such a problem.

13 MR. HISSAM: Your Honor, I would say it's a blanket per
14 se rule. The reason that the Supreme Court and the Fourth
15 Circuit have never adopted that per se rule because, in their
16 precedence, they continue to say that even co-defendants can be
17 represented by the same lawyer.

18 THE COURT: Any of those cases involve a situation
19 where the thing has already blown up in everybody's face once in
20 the very same case?

21 MR. HISSAM: Your Honor, I would say that it has blown
22 up with respect to co-defendant business partners and --

23 THE COURT: But I don't know what I don't know, and
24 neither do you, and these guys are all involved in the same
25 general practice at the same mine, okay?

1 That's the problem I have with this, is -- and this is the
2 problem I had back when I talked to Mr. DiPiero about it months
3 ago. I didn't know what I didn't know. I don't know what he
4 knew then, but he thought he could do it, and Mr. DiPiero has --
5 in spite of what he might be thinking right now, he has a lot of
6 credibility with me. He's an excellent lawyer, all right, and a
7 very experienced lawyer in criminal matters, and he thought he
8 could do this and, in large part, I let it go based on his
9 credibility, but I've learned from this and Mr. DiPiero didn't
10 know what he didn't know.

11 Now, you're telling me he might have known some of this. I
12 don't know. I didn't know. But I've been burned once in this
13 case already and you're not really doing a good job of convincing
14 me I should dive right back into this again today, because it
15 would just be simpler if every defendant had their own
16 conflict-free lawyer. Then you don't have any of these problems.

17 MR. HISSAM: Except for, Your Honor, that as a per se
18 rule, that deprives a defendant of his choice of lawyer.

19 THE COURT: It's not a per se rule. It's a rule for
20 this mess to get us through it. I'm not -- I'm very -- trust me.
21 After -- I've had this come up twice and, both times, it's broken
22 down, okay? So I'm tempted to adopt a per se rule, I am, because
23 it would just make life simpler, but I understand, among other
24 things, there are economics involved in this and a variety of
25 other factors why defendants may want to have the same lawyer;

1 So I'm not adopting a per se rule, let's be clear about
2 that, but in this case, it would certainly be simpler, given the
3 history that we now have in the case, if every defendant had
4 their own lawyer. Don't you agree with that?

5 MR. HISSAM: I believe, Your Honor, that it would be
6 simpler and, from the Court's perspective, would offer the
7 advantage of not having to deal with conflict issues. I do not
8 believe, though, that it would be permissible because there is
9 not a disqualifying conflict for Mr. Barnette and Mr. Ellis and,
10 therefore, that rule, applied here in this case, deprives them of
11 their right to retained counsel of their choice.

12 THE COURT: So the choice -- the dilemma that you put
13 me in is either deny them -- deny Mr. Ellis the opportunity to
14 have you represent him and face reversal on appeal, or allow it,
15 and face a reversal on a 2255?

16 MR. HISSAM: Your Honor, this is the dilemma that the
17 Courts have been faced with, and the only reason I mentioned the
18 Virginia case, Your Honor, is just an example of -- I've been
19 through this situation where --

20 THE COURT: Well, no, you haven't, because -- because
21 my colleague, Judge Jones, was not facing a situation where the
22 thing had already blown up once, all right, and didn't have that
23 history. That's different, isn't it?

24 MR. HISSAM: Well, Your Honor, I would say it did blow
25 up because the government raised a serious issue and asked for a

1 disqualification of counsel, which -- you know, so it certainly
2 came front and center and the government maintained that counsel
3 was disqualified. Now, that's different, obviously, than this
4 case, where Ms. Thomas is saying that counsel does not need to be
5 disqualified, and is agreeing to -- is agreeing to representation
6 provided waivers exist.

7 Your Honor, all I can say about the 2255 is that is why the
8 colloquy and waiver process exists. That's why Mr. Barnette and
9 Mr. Ellis are here and prepared to answer the Court's questions.

10 I understand the difficulties. I understand that
11 ineffectiveness is not subject to waiver. I understand that.
12 But in -- from the *Wheat* case on down, there has been a colloquy
13 that takes place between the Court and joint defendants in a
14 joint representation case that the Courts have adopted as a way
15 to sooth concerns over an eventual 2255.

16 Your Honor, I am -- I understand the Court's frustration
17 with how this came to be. It is a highly, highly unusual fact
18 pattern. In all the conflict cases I've looked at, I've never
19 seen one with a fact pattern like this.

20 THE COURT: And, therefore, I don't think, no matter
21 what I do, you can draw a per se rule out of anything.

22 MR. HISSAM: Perhaps, Your Honor. Perhaps.

23 THE COURT: All right. Well, let's see if Mr. Carr
24 still thinks it's such a good idea to represent two defendants in
25 this case.

1 MR. CARR: Your Honor, first, I would state for the
2 record that I have only discussed the terms of the representation
3 with Mr. Steve Herndon. I have not discussed any confidences and
4 have not even requested his file from Mr. DiPiero, given that the
5 Court had not actually acted upon Mr. DiPiero's Motion to
6 Withdraw.

7 THE COURT: Have you entered an appearance?

8 MR. CARR: Yes, Your Honor, I have entered an
9 appearance, but I have no confidences from Mr. Herndon, realizing
10 the Court may or may not actually recognize my appearance or
11 permit that appearance.

12 THE COURT: Well, my question then is, having heard my
13 discussions with Mr. Hissam, are you sure you want to do this?

14 MR. CARR: Your Honor, I would say this in regards to
15 the -- Mr. David Herndon and Mr. Steve Herndon, and I had
16 discussed this with David Herndon from the very beginning. They
17 are father and son. They were not business partners. Neither
18 one of them had any knowledge of the other's activities in this
19 case. David Herndon was not aware of Stephen Herndon's
20 activities.

21 THE COURT: But you haven't discussed any confidences
22 with them, right?

23 MR. CARR: Sir, I have not discussed any confidences,
24 other than that one question, and I also asked the government.
25 "Mr. Steve Herndon, did you know anything about your father's

1 activities," and the answer to that was no. I have also
2 discussed that with David Herndon. I have otherwise not
3 discussed a single fact or conversation regarding Steve Herndon.

4 THE COURT: Are you sure you know what you don't know?

5 MR. CARR: Your Honor, I am confident, given the
6 discovery in the case and the fact that they did not know each
7 other's activities at the time it was taking place, that there is
8 not any conflict, or any even remotely real possibility of
9 conflict between father and son.

10 Your Honor, I would also just state, and I certainly believe
11 that the Court's feelings on this are very clear to anyone who is
12 in this courtroom right now.

13 THE COURT: That was the intent.

14 MR. CARR: Yes, sir. However, given the number of
15 defendants that are not only in this case, but in related cases,
16 given how this matter actually came to light in a number of the
17 other investigations which have permitted this investigation by
18 the government, there are significant -- there is a significant
19 number of conflicts with the criminal defense bar in this
20 district.

21 THE COURT: So, what you're telling me is, there's more
22 to come?

23 MR. CARR: Your Honor, I don't know if there's more to
24 come. It's just there's a lot of -- the lawyers who typically
25 appear in federal District Court who have conflicts in this

1 matter and are not available to someone like Mr. Steve Herndon to
2 actually come in and for him to feel comfortable with
3 representation.

4 THE COURT: Well, that may be, although there are, for
5 example, some excellent lawyers in the Northern District. I know
6 that from experience and, to the extent that there's a conflict,
7 there's -- the availability of local lawyers is really beside the
8 point, isn't it?

9 MR. CARR: Your Honor, it is to the extent that, if
10 there actually is a conflict, that we just understand the Court
11 otherwise might question, why doesn't everybody just, you know,
12 go out and go ahead and get individual counsel and, in this case,
13 given the number of conflicts, there's a number of
14 considerations, I think, on behalf of defendants, such as Stephen
15 Herndon, as to why he might want to pick somebody who does not
16 have a conflict, but is otherwise involved and familiar with the
17 case.

18 THE COURT: Well, let's hear from the government.

19 MS. THOMAS: In regard to Mr. Ellis's motion, I'll talk
20 about that first. As far as I know, in regards to Mr. Barnette
21 and Mr. Ellis, everyone is still cooperating. There's been no
22 Motion to Withdraw from guilty pleas.

23 I did, in the response, want to make sure the Court was
24 aware that it is the United States' position that Mr. Barnette
25 and Mr. Ellis did participate in criminal activity together and

1 that if any -- if either of those defendants attempted to
2 withdraw from their plea agreement, or their guilty plea, or some
3 reason testimony was needed, either could potentially be a
4 witness against the other, and that was the purpose of pointing
5 that out to the Court. That --

6 THE COURT: There appears to be a disputed fact on that
7 point and, at this point, I'm aware of no facts one way or the
8 other, but you and Mr. Hissam don't seem to agree on that point.

9 MS. THOMAS: Mr. Hissam has received a Memorandum of
10 Interview regarding an interview with Mr. Ellis where Mr. Ellis
11 has provided information about how he would contact Mr. Barnette
12 when they were placing bids at Mt. Laurel at the direction of
13 Steve Herndon to discuss what their bids would be and, while Mr.
14 Herndon, when he talked to Mr. Ellis, wouldn't give a specific
15 bid amount, he may have given them a range, and I'm just
16 proffering this out of the Memorandum of Interview, and then
17 Ellis would call Mr. Barnette and tell him what Tri-State, his
18 company, was going to bid. Those were the transactions that Mr.
19 Ellis would be paying a kickback on, as well. So they do have
20 evidence against each other in regard to that.

21 Mr. Barnette would submit a bid understanding that he
22 wouldn't get the job -- sorry -- wouldn't get that job. So, I
23 think -- and, also, I believe Mr. Barnette told us, at one point,
24 and I believe Mr. Hissam was at the interview, that he had
25 actually approached Mr. Ellis and tried to get him to stop paying

1 kickbacks, which is commendable, but again, there's more evidence
2 that they knew what the other one was up to and they participated
3 together in a conspiracy.

4 But, assuming they're going to go through with sentencing,
5 they don't tell a really different story, they don't have a
6 conflict of fact in what they're saying, and so, in that regards,
7 the United States does not object to Mr. Hissam representing Mr.
8 Ellis.

9 THE COURT: Maybe you should.

10 I -- just as a comment, I think the government -- I know you
11 stepped in sort of on the tail end of all this, but I think the
12 government should be a little bit more vigilant on recommending
13 in these situations separate counsel just to avoid this very
14 situation. That just would be cleaner. That doesn't -- I mean,
15 that's a -- that's a small comment. I think this is a defense
16 counsel issue really, but in the beginning, sometimes the
17 government is the only party that has a lawyer involved. So, I
18 offer that comment for future reference.

19 MS. THOMAS: Thank you, Your Honor.

20 THE COURT: Mr. DiPiero, I guess we've come back around
21 to you. First of all, I'm going to have to continue Mr. Porter's
22 hearing on Thursday because I have a scheduling problem and, at
23 this point, given the history of all of this and your involvement
24 in it, it seems to me you're probably going to have to convince
25 me why I should allow you to continue to represent Mr. Porter.

1 Now, you can -- I mean, I'll hear from you now, but I have a
2 feeling what I probably should do is have everybody brief this a
3 little bit further so that I can assess it more carefully,
4 especially given the fact that I am -- you know, I've read a
5 couple of the -- I've read Mr. -- I've read Stephen Herndon's
6 Presentence Report now, and I've read Mr. Roeher's, so I have a
7 much better sense of the facts than I did at the plea hearings,
8 but I'm still probably the least informed person in this room
9 about the facts of this case and the relationships among these
10 parties, so I think I'm going to need some briefing in order to
11 determine exactly, you know, what I should do with these issues,
12 but I will hear from you now. You -- we started with you, maybe
13 I'll finish with you.

14 MR. DIPIERO: Well, first, let me just say, I apologize
15 that we're in this mess. I wish I would have heeded your caution
16 based upon your experience. I had not had the experience before
17 and so I do regret that we're here.

18 I'm not going to say anything about Mr. Ellis and Mr.
19 Herndon because I don't want anything to be misconstrued as
20 violating the attorney-client privilege. You've asked me
21 strictly about Mr. Porter, at this point.

22 And, I would submit that I had represented Mr. Porter first.
23 I had represented him on other matters, civil matters, and he was
24 the first person that came to me with respect to any of this, and
25 that his job is totally unrelated to the jobs that Mr. Roeher,

1 Mr. Ellis and Mr. Herndon have and they really -- really had no
2 business contact during this process. Mr. Porter did not deal
3 with Mr. Herndon, for instance.

4 And, so I would respectfully submit that, although I know
5 it's -- it looks awful and this thing is very difficult for Your
6 Honor, I appreciate your comments, and I wish I would have
7 appreciated them more earlier. This was something unusual for
8 me. It never happened before, particularly where the government
9 asked me to talk to Mr. Ellis, and that was really unusual, and
10 it wasn't -- I didn't think they were doing anything improper. I
11 wasn't being a flunky for them. It was just one of those
12 situations where I didn't perceive Mr. Ellis as coming in any
13 later than the other two. He just happened to not be available
14 that weekend. He was just out of town. I felt like they all
15 came in at the same time, as far as I was concerned.

16 And so, at any rate, I respectfully -- I know Mr. Porter
17 would like for me to continue to represent him. I don't think he
18 has any actual or even really potential conflict. I will tell
19 you that there was -- there was some hearsay statements made by
20 Mr. Herndon that --

21 THE COURT: Stephen or --

22 MR. DIPIERO: That related to Mr. Porter.

23 THE COURT: Which Herndon?

24 MR. DIPIERO: Steve Herndon.

25 THE COURT: Okay.

1 MR. DIPIERO: That came up and I wanted to be open
2 about that. It's actually in Mr. Porter's Presentence Report, if
3 you've seen it. It's really a minor area.

4 It doesn't have anything to do with the ultimate issues, but
5 I had checked Mr. Porter, and Mr. Lusk, who it involves, denied
6 the hearsay, and Mr. Herndon, I believe, would state that he
7 doesn't know if it's true or not. He was asked if he heard
8 anything.

9 So that's the only thing that I've seen that's come up in
10 any way, shape or form between Mr. Herndon, Mr. Roeher, and Mr.
11 Ellis related to Mr. Porter at all and I can't think of anything
12 else that has ever come up because they just really didn't have
13 any dealings together and so I would, most respectfully, even
14 though I'm right in the middle and at the heart of all of this
15 mess, respectfully, on behalf of Mr. Porter, request -- one of
16 the problems is not just the availability, I know that's been
17 mentioned, but for someone to start from scratch, it would be
18 difficult and costly and, I believe that Mr. Porter is ready for
19 his medicine, and has been waiting for sometime, and we most
20 respectfully would like to go forward with our sentencing as soon
21 as your schedule is available, if I'm allowed to stay involved.

22 THE COURT: All right. Do you want to submit something
23 in writing in support?

24 MR. DIPIERO: On that issue, I can. I was -- I was not
25 prepared to put anything in writing with respect to Mr. Herndon

1 or Mr. Ellis.

2 THE COURT: Well, at this point, I'm just -- you've
3 conceded that you had to get out of the Ellis and Herndon cases,
4 but if you want to submit something in writing, I will allow you
5 to.

6 MR. DIPIERO: Yes, sir.

7 THE COURT: And I'll -- I will consider it.

8 MR. DIPIERO: Thank you, sir.

9 THE COURT: We'll talk about the timing of that in a
10 moment.

11 Mr. Hissam, I think I probably need to -- I think we need to
12 brief your situation further. I will -- well, how long do you
13 need to file a -- first of all, let's talk about when is -- when
14 are Mr. Barnette and Mr. Ellis's -- I know Mr. Ellis is not set
15 for sentencing until February or March.

16 MR. HISSAM: It's in February, Your Honor, the first
17 week of February, and Mr. Barnette's is January 21st (sic). On
18 the 12th. I'm sorry, Your Honor, 12th.

19 THE COURT: Okay.

20 MR. HISSAM: So, the sentencing memos, just for the
21 Court, you know, to take into account, the sentencing memo in Mr.
22 Barnette's case is due January 5th.

23 THE COURT: Okay.

24 MR. HISSAM: Your Honor, I could brief -- I could
25 certainly brief it within ten days, fourteen days, whatever the

1 Court prefers.

2 I would, if I could, Your Honor, address one issue, which
3 is, given the argument, the legal argument I've made, in
4 stressing client choice and choice of retained counsel, to the
5 extent that this will be the last time we're before the Court in
6 a live hearing, I would at least like to proffer the existence of
7 a waiver and tender the waivers to the Court so that they'll be
8 in the record.

9 Otherwise, if we're not going to be back in front of the
10 Court, I would rather do it here live in person and, even if the
11 Court wanted to conduct a colloquy, understanding that it may be
12 for naught under the Court's legal reasoning, but so that that's
13 in the record and I'm not just arguing in a brief.

14 THE COURT: Well, here's my suggestion, because I might
15 very well have another hearing on this after the briefing. Right
16 now, I'm not sure that I could conduct an intelligent colloquy
17 because I don't know enough. So I would suggest that you submit
18 with your brief the waivers and then I will consider whether or
19 not to have another hearing, the purpose of which may very well
20 be solely to conduct that colloquy, I don't know, but I don't
21 know that I am well informed enough about this at this point --

22 MR. HISSAM: Sure.

23 THE COURT: -- to conduct the colloquy I need to
24 conduct. So, fourteen days works for you to file a memorandum?

25 MR. HISSAM: Yes, sir.

1 THE COURT: All right. Mr. Carr, can you file a
2 memorandum in support of your request to enter an appearance on
3 behalf of Stephen Herndon?

4 MR. CARR: Yes, Your Honor.

5 THE COURT: In fourteen days?

6 All right. Mr. DiPiero, can you comply with that period of
7 time?

8 MR. DIPIERO: I can do it sooner, if you want.

9 THE COURT: Well, we're going to get into the holidays.
10 Most of these hearings are set -- I think Mr. Porter's is the
11 only one right now that is still set this year, so I think that's
12 plenty of time. Then, so today is the 8th. That's the 22nd.

13 Ms. Thomas, I don't want you to have to file something in
14 the middle of the holiday, so how about January 9th?

15 MS. THOMAS: That's fine, Your Honor.

16 THE COURT: All right. So, if there's one on -- Mr.
17 Barnette's is on January 12th. We may not be able to do that
18 then as a result of this.

19 Another question you need to address, Mr. Hissam, is this:
20 If I determine that you are disqualified from representing Mr.
21 Ellis, it appears to me that you've probably cultivated something
22 of an attorney-client relationship with him, at this point. The
23 question then will be whether or not you can continue to
24 represent Mr. Barnette.

25 MR. HISSAM: Yes, sir. I'll certainly address that.

1 THE COURT: You will need to address that and, Mr.
2 Carr, I suppose that's also an issue with you potentially, as
3 well.

4 MR. CARR: Yes, Your Honor.

5 THE COURT: All right. So that's the schedule and I
6 will take a look at it and I will decide whether or not I want to
7 have another hearing at that point.

8 Anybody else have anything?

9 MS. THOMAS: Yes, Your Honor. I have a question. I
10 was hoping for the Court's guidance. A number of the individuals
11 are still cooperating with the government. We've had ongoing
12 contact with a number of them. I don't want to run into any
13 attorney-client representation issues. We don't want to the have
14 unrepresented contacts, obviously.

15 Some of these individuals are providing valuable assistance
16 to the government. Do we --

17 THE COURT: I don't know what to tell you about that.
18 First thing comes to mind is, not my problem.

19 MS. THOMAS: Yes, Your Honor.

20 THE COURT: And I think that's -- I think that's
21 something you need to be really careful with, actually, and I
22 don't really know that I have anything to offer to you on that.
23 I'm trying to sort out my mess; you'll have to sort out your own.

24 MS. THOMAS: Thank you, Your Honor.

25 THE COURT: I mean, I don't -- what else could I do?

1 MS. THOMAS: I know. I understand.

2 THE COURT: I don't know that there's anything else I
3 can do about it.

4 MS. THOMAS: I think we might just have to wait. We'll
5 --

6 THE COURT: And, it's something that's occurred to me,
7 as Mr. Carr was talking this morning, I'm sure -- I'm aware that
8 some of the defendants are cooperating. I'm aware -- however,
9 I'm guessing, speculating, that that might generate other cases
10 and I think the government would be well advised to keep all of
11 this mess in mind for any future cases that come out of this.

12 MS. THOMAS: Yes, Your Honor.

13 THE COURT: All right. Anything else we need to take
14 up today?

15 MR. HISSAM: Your Honor, if I may, briefly. I just
16 don't want to bother the Court with an unnecessary motion. One
17 of the two waivers that I've prepared to tender is set forth
18 within a fee agreement that has been redacted and I would propose
19 to tender that waiver in its redacted form so that it need not be
20 sealed. I know the Courts are rather sensitive about sealing.

21 THE COURT: I don't like to seal things.

22 MR. HISSAM: Right. And so I would prefer, with the
23 Court's permission, to tender it such that it's a fee agreement
24 with all of the material terms omitted except for the conflict
25 waiver and signature line.

1 THE COURT: Well, here's --

2 MR. HISSAM: I offer that, Your Honor, as an
3 alternative to sealing.

4 THE COURT: We'll here's my thought on that, and that
5 is that I'm a little hinky about things I don't know about in
6 this case, at this point, to use a highly technical term, and my
7 suggestion is that you tender the un-redacted agreement for
8 placement of the document on the docket under seal, and then put
9 the redacted version --

10 MR. HISSAM: Right.

11 THE COURT: -- on the docket with your brief not under
12 seal.

13 MR. HISSAM: Your Honor, I would, with the Court's
14 indulgence, ask one caveat to that. Given that it does contain
15 -- the un-redacted version contains the material terms of the
16 representation, I would ask that it not just be under seal, but
17 ex parte, so the United States does not have access to what would
18 otherwise remain attorney-client privilege.

19 THE COURT: Any objection to that?

20 MS. THOMAS: I don't think so, Your Honor. I'm really
21 -- the United States is mostly interested in the conflict
22 language.

23 THE COURT: I am, too, but, I mean --

24 MS. THOMAS: I have no objection to the other stuff
25 being redacted.

1 THE COURT: I probably shouldn't have used the word
2 "hinky", but I'm leery of things I don't know in this case.

3 MS. THOMAS: Right.

4 THE COURT: So, the answer is, you have no objection?

5 MS. THOMAS: I have no objection.

6 THE COURT: Anybody else have an objection to that?
7 Hearing none, that's the way we'll do it.

8 MR. HISSAM: Yes, Your Honor.

9 THE COURT: Anything else?

10 MR. HISSAM: No, sir.

11 THE COURT: All right. Thank you.

12 (Proceedings concluded at 10:49 a.m., December 8, 2014.)
13

14 CERTIFICATION:

15 I, Ayme A. Cochran, Official Court Reporter, certify that
16 the foregoing is a correct transcript from the record of
17 proceedings in the matter of United States of America, Plaintiff
18 v. Stephen Herndon, Scott Ellis, Alvis Porter, Ronald Barnette &
19 David Herndon, Defendants, Criminal Action Nos. 2:14-cr-110,
20 2:14-cr-111, 2:14-cr-112, 2:14-cr-114 & 2:11-cr-215, as reported
21 on December 8, 2014.
22

23 s/Ayme A. Cochran, RMR, CRR

December 15, 2014

24 Ayme A. Cochran, RMR, CRR

DATE
25